Dyca ak Rawing v Public Prosecutor

HIGH COURT (SIBU) — CRIMINAL APPLICATION NO 20–44–1 OF 1998
TEE AH SING J
19 JUNE 1998

Criminal Procedure *— Appeal — Procedure for, principles governing — Filing of additional grounds, application to extend time — Delay of $2^1/_2$ years — Counsel of opinion that petition of appeal filed by previous counsel inadequate — Whether delay inordinate — Criminal Procedure Code (FMS Cap 6 s 310*

The appellant applied under s 310 of the Criminal Procedure Code (FMS Cap 6) for an order that time be extended to allow the appellant to file in additional grounds of appeal supplementary to the appellant's petition of appeal. Counsel submitted that the appellant was not complaining of the inadvertence nor incompetence of his previous counsel but rather a different professional opinion in so far as the adequacy of the original petition was concerned. The Deputy Public Prosecutor objected to the application on the ground that there was a delay of $2^1/_2$ years.

Held, dismissing the application:

The delay of over two years was inordinate and no satisfactory explanation was given in the affidavit. On this ground, an extension of time would not be granted (see p 440H–I); *Zulkifli bin Puasa & Ors v PP* [1985] 1 MLJ 461, *R v Rhodes* (1910) 5 Cr App R 35 and *R v Moona Mohamed Hussain Maricar* [1936] MLJ Rep 29 followed.

[Bahasa Malaysia summary

Perayu memohon di bawah s 310 Kanun Acara Jenayah (NMB Bab 6) untuk satu perintah bahawa masa dilanjutkan bagi membolehkan perayu memfailkan alasan rayuan tambahan kepada petisyen rayuan perayu. Peguam berhujah bahawa perayu tidak mengadu tentang kelalaian atau pun ketidakcekapan peguamnya yang lebih awal tetapi pendapat undang-undang yang berbeza sejauh mana kecukupan petisyen asal adalah berkaitan. Timbalan Pendakwa Raya membantah terhadap permohonan atas alasan terdapat kelewatan selama $2^1/_2$ tahun.

Diputuskan, menolak permohonan:

Kelewatan selama lebih dua tahun adalah melampau dan tiada penjelasan yang memuaskan telah diberikan dalam afidavit. Atas alasan ini, perlanjutan masa tidak akan diberikan (lihat ms 440H–I); *Zulkifli bin Puasa & Ors v PP* [1985] 1 MLJ 461, *R v Rhodes* (1910) 5 Cr App R 35 dan *R v Moona Mohamed Hussain Maricar* [1936] MLJ Rep 29 diikut.]

Notes

For cases on principles governing appeal, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 360–374.

Cases referred to

Ishak bin Hj Shaari v PP [1997] 5 MLJ 28 (refd)
Masnelan Pakpahan v PP [1989] 2 MLJ 362 (refd)
R v Rhodes (1910) 5 Cr App R 35 (follld)
Rex v Moona Mohamed Hussain Maricar [1936] MLJ Rep 29 (follld)
Veerasingam v PP [1958] MLJ 76 (refd)
Zulkifli bin Puasa & Ors v PP [1985] 1 MLJ 461 (follld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 310

Orlando Chua (*Wong, Orlando Chua & Co*) for the applicant.
Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor) for the respondent.

Tee Ah Sing J: This is an application by notice of motion under s 310 of the Criminal Procedure Code ('the CPC') for an order that time be extended to allow the appellant to file in additional grounds of appeal supplement to the appellant's petition of appeal dated 3 August 1995 within 10 days after the said order.

The application is supported by the affidavit of Orlando Chua Siau Wei affirmed on 9 February 1998 ('the said affidavit').

Learned counsel for the appellant submitted that the appellant is not complaining of the inadvertence nor incompetence of his previous counsel but rather a different professional opinion in so far as the adequacy of the original petition is concerned. He submitted that the appellant needs only to show that on the face of it his proposed additional grounds of appeal are meritorious and that it would therefore be a denial of substantial justice if these additional grounds are not fully argued. The court is given discretion under s 310 of the CPC to grant the application so that substantial justice may be done. In support, the case of *Ishak bin Hj Shaari v PP* [1997] 5 MLJ 28 was cited.

He further submitted that the petition of appeal was dated 3 August 1995 and there is a lapse of $2^1/_2$ years. This is a case of a mere lay person entrusting his fate to his then counsel who had in the same deemed it fit to file in the petition of appeal which in turn in the humble opinion of his new counsel is insufficient and further deemed it fit to have additional grounds of appeal to be filed.

He submitted that the conduct of the appellant is blameless and in the light of the learned observation of Suriyadi J, the inadvertence and incompetence of solicitors, if any, could be a ground of consideration (*Ishak bin Haji Shaari v PP*). It was thus submitted that despite the lapse of

A $2^1/_2$ years, such delay in the circumstances of the case cannot be construed as deliberate or inordinate.

The learned Deputy Public Prosecutor ('the DPP') has objected to this application. In support, the following cases were cited:

B (1) *Rex v Moona Mohamed Hussain Maricar* [1936] MLJ Rep 29;

(2) *Veerasingam v PP* [1958] MLJ 76;

(3) *Masnelan Pakpahan v PP* [1989] 2 MLJ 362;

(4) *Zulkifli bin Puasa & Ors v PP* [1985] 1 MLJ 461.

C The learned DPP submitted that the law as it stands, the exercise of judicial discretion under s 310 must be with the greatest care and extreme judiciousness bearing in mind a few points. The appellant had a counsel in the person of Mr Robin Hii to act on his behalf. There were no less than 10 hearing dates fixed for this case, the first was on 30 September 1995 where the appellant himself was present and where Mr Robin Hii applied to discharge himself. On the second date on 4 January 1996, the appellant was D absent and a warrant of arrest was issued against him. The other dates where the appellant was absent were on 14 June 1996, 23 October 1996, 6 January 1997, 5 August 1997, 15 October 1997 and 6 January 1998. The appellant was only present on 13 January 1998 when he was brought to this court by the police from Kuching where he was remanded for other cases.

E The learned DPP submitted that on 30 September 1995, the appellant's presence before this court shows clearly that the appellant knew an appeal was pending. The appellant also knew that his counsel Mr Robin Hii had discharged himself. The appellant was at liberty to obtain the advice of other counsel in respect of his appeal but the appellant did not do so until after 13 January 1998, so there was a delay of over two years.

F The explanation given as to delay is not satisfactory.

Further, the additional grounds are not of much merits and could be dealt with under the original petition of appeal.

Learned counsel for the appellant in reply conceded that the conduct of the appellant as outlined by the learned DPP is appalling but he submitted G that the appellant should not be penalised at this stage.

Learned counsel for the appellant submitted that to achieve substantial justice, the proposed additional grounds of appeal ought to be fully argued so that a rightful conviction can be upheld and a wrongful one be quashed.

H Section 310 of the CPC reads as follows:

> A Judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the Magistrate and to the parties as such Judge shall consider desirable, in order that substantial justice may be done in I the matter.

Now, what are the circumstances of this case to enable the court to exercise its discretion 'in order that substantial justice may be done?'

The relevant parts of the said affidavit reads as follows: A

(2) I have duly on 3 February 1998 received a copy of the appeal record from one Mary Rawing, a family member of the abovenamed appellant pertaining to the abovementioned case. Prior to that, I understand Mr Robin Hii of Messrs Robin Hii & Co, Advocates, Sibu was representing the appellant. B

(3) I humbly crave leave to refer to the appellant's petition of appeal dated 3 August 1995 ('the said petition of appeal').

(4) I make this affidavit in support of the application to this court for extension of time to file additional grounds of appeal. A copy of the proposed additional grounds of appeal is exhibited herein and marked 'A'. C

(5) Upon perusal of the said petition of appeal, I in the capacity as the appellant's counsel, verily believe that the additional grounds are essential and/or substantial and/or meritorious and your humble appellant prays that the court would exercise its discretion in the interest of justice to permit the addition of the said new grounds of appeal to the said petition of appeal in pursuant to s 310 of the Criminal Procedure Code (FMS Cap 6). D

In *Zulkifli bin Puasa & Ors v PP*, Sir Alan Huggins JA, speaking for the Brunei Court of Appeal, said (at p 462C):

> There are two factors to be considered upon an application for an extension of time: (1) the length of the delay and whether it can be satisfactorily explained; and (2) whether the out of time application is likely to succeed. E
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> Where, as here, the delay is of short duration the court may, if it thinks fit, disregard the delay, even in the absence of satisfactory reasons, but, where a substantial interval of time (a month or more) has elapsed, an extension of time will not be granted, as a matter of course, without a satisfactory explanation: see *R v Rhodes* (1910) 5 Cr App R 35. Where the delay is minimal, the court will still not grant an extension of time if the application for which the extension is sought is bound to fail: there must be an arguable case. Moreover, even though the subsequent application may be likely to succeed — as where a fellow-prisoner's conviction has been quashed — the court will not grant an extension of time as a matter of course: see *R v Rigby* (1923) 17 Cr App R 111. The entire circumstances will be considered. F G

On 30 September 1995, when the hearing of this appeal was fixed, the appellant was present with his counsel Mr Robin Hii. On that day, his counsel Mr Robin Hii applied to discharge himself and the discharge was granted. The appellant knew that Mr Robin Hii had discharged himself. H

It was only on 3 February 1998 that the appellant engaged his present counsel. So, there was a delay of over 2 years. The appellant has not given any reasons why he was unable to engage another counsel from 30 September 1995 till 3 February 1998.

I am of the view that the delay of over 2 years was inordinate and no satisfactory explanation was given in the affidavit. On this ground an extension of time would not be granted (see *Zulkifli bin Puasa & Ors v PP* and *R v Rhodes* (1910) 5 Cr App R 35). I

In *R v Moona Mohamed Hussain Maricar* [1936] MLJ Rep 29, His Lordship Terrell J at p 31B–C said:

> If the rules are to be relaxed in a case like this, it is more than likely that a practice will grow up of filing in the first instance nominal grounds of appeal only, such as were filed on 25 July, reliance being placed on an application to amend such grounds at a later date. The provisions of the Criminal Procedure Code state clearly and fairly what the rules of procedure are, and such rules, as stated by the Court of Criminal Appeal in *Nagalingam*'s case (Singapore Criminal Appeal No 1 Of 1935), should only be relaxed in very exceptional circumstances.

In the instant case, I find that no exceptional circumstances have been shown to exist and that accordingly the application must be refused.

In conclusion, I find that there are no grounds for me to exercise my discretion under s 310 of the CPC to extend time to allow the appellant to file additional grounds of appeal.

I therefore dismiss the application.

Application dismissed.

Reported by Loo Lai Mee